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IN THE

Supreme Court of the United States

October Term, 1965.

No. 799

CLEMENT V. CONOLE, CHARLES E. ANABLE, RICHARD C. CONOLE, BRIDWELL W. LINCOLN, WILLIAM J. CALLAHAN and ALVA M. MEYERS,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Clement V. Conole, Charles E. Anable, Richard C. Conole, Bridwell W. Lincoln, William J. Callahan and Alva M. Meyers petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above case on August 26, 1966.

OPINIONS BELOW.

The United States District Court for the Eastern District of Pennsylvania filed no formal written opinion; the oral opinion of the District Court is set forth at pages 313a-317a of the printed appendix. The opinion of the United States Court of Appeals for the Third Circuit (App., *infra*, pp. 1a-3a) is reported at 365 F. 2d 306.

JURISDICTION.

The judgments of the United States Court of Appeals for the Third Circuit (App., *infra*, pp. 4a-15a) were entered on August 26, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the court below erred in failing to consider or even advert to the principal issue tried before the district court and argued on the appeal, namely, whether the prosecution sustained its burden of proving beyond a reasonable doubt that the six petitioners had voted unconditionally on resolutions at a board of directors' meeting in defiance of a temporary restraining order, rather than conditionally as the six petitioners testified.

2. Whether the court below erred in failing to consider the second major issue presented on the appeal, namely, whether the hearing accorded to the petitioners in the district court satisfied the requirement of Rule 42(b) of the Federal Rules of Criminal Procedure that a full due process hearing must be accorded in the trial of a charge of alleged criminal contempt committed out of court.

3. Whether, in the circumstances of this case, the charge of criminal contempt should have been tried before a jury.

STATEMENT.

Petitioner Clement V. Conole, at the time here involved, was Chairman of the board of directors, and owner of 50% of the issued stock, of Business Supplies Corporation, a Massachusetts corporation with executive offices in Pennsylvania. The remaining petitioners were also directors of BSC (5a-6a). On February 10, 1964, a BSC board of directors' meeting was scheduled to be held at 10:00 A. M. in the company's Bryn Mawr office to consider certain proposals, including an amendment of the by-laws with respect to removal of directors, the execution and ratification of employment contracts with key executives, and the extension of restricted stock options (7a-8a, 12a-14a).

At 8:45 A. M. on that day, L. Stanley Crandall, one of the company's nine directors and owner of the remaining 50% of the issued stock, appeared *ex parte* before Judge Thomas J. Clary and presented a complaint which charged petitioners with having "* * * engaged in a course of conduct designed * * *" to deprive Crandall of his rights as stockholder and director (5a-10a). On the basis of averments in the complaint that petitioners were about to take further allegedly improper steps (6a-9a), Judge Clary signed an *ex parte* temporary restraining order which prohibited favorable action, without Crandall's approval, on the proposals scheduled for consideration at the meeting in Bryn Mawr at 10:00 A. M.

The board of directors' meeting was in progress when Crandall, accompanied by three lawyers and an Assistant United States Marshal, arrived. The Marshal served each petitioner with copies of the complaint, the temporary restraining order and a petition for preliminary injunction, returnable February 13, 1964, and he advised petitioners that the papers included a temporary restraining order (66a-71a). After the service, the Marshal and Crandall's attorneys withdrew to another room at the request of petitioner Conole, and the meeting continued (20a-21a).

It is undisputed that the six petitioners thereafter voted in favor of the resolutions (72a-74a, 79a-80a, 176a-177a, 227a, 234a-235a, 262a, 276a); that Crandall and the two directors allied with him, William Speers and Charles Molloy, participated in the proceedings and voted on the resolutions but against them (72a-74a, 79a-80a, 83a-84a, 166a, 169a-170a); and that Molloy, an attorney, voiced no objection to the procedure being followed (76a, 83a, 158a). The critical issue tried before Judge Clary was whether this voting was conditional or in willful defiance of his temporary restraining order. See, *infra*, pp. 5-6.

Immediately following adjournment of the meeting, Crandall, accompanied by his attorneys, the Marshal, Speers and Molloy, returned to Philadelphia (298a-299a). Without a motion or application of any kind pending, and without notice to Conole, Anable, R. C. Conole, Lincoln, Callahan, or Meyers whom they had just left, Crandall and his counsel again appeared *ex parte* before Judge Clary. Crandall gave *ex parte* testimony (22a-27a) as to his version of the meeting—that the defendants, after service of the temporary restraining order, had nevertheless voted unconditionally to adopt the prohibited resolutions. After hearing only Crandall, Judge Clary stated: "On this statement they have clearly violated the terms of the order" (28a). Following Crandall's testimony, and before Speers and Molloy made brief corroborating statements, Judge Clary caused subpoenas to be issued, commanding petitioners to appear before him on February 13, 1964, at the hour scheduled for the hearing on the petition for a preliminary injunction in Crandall's civil suit (28a-29a).

Petitioners appeared before Judge Clary at the appointed time and were there served by the United States Attorney, acting at the instance of Judge Clary (96a), with a motion under Criminal Rule 42(b), directing them to show cause why they should not be adjudged guilty of criminal contempt (1a, 31a-34a). The hearing on the charge was fixed for March 2, 1964.

Petitioners' answer to the motion averred that BSC had no local counsel available; that, doubtful as to the validity of the service of the temporary restraining order while the meeting was in progress, petitioner Conole had suggested that a vote be taken on the resolutions but only conditionally; and that, after the meeting, petitioners consulted Philadelphia counsel and were advised that the service was proper and the resolutions not effective (35a-38a). The answer further showed that, on February 12, 1964, the Philadelphia counsel retained by petitioners had advised Crandall's counsel that the resolutions were void and would not be implemented (36a-37a).

At the time that petitioners' Philadelphia counsel gave this advice to Crandall's counsel, petitioners had no knowledge that criminal contempt proceedings had been begun by Judge Clary. On February 13, 1964, the return day on Crandall's motion for a preliminary injunction, petitioners' counsel, checking the district court docket as to return of service of the temporary restraining order, found an entry which indicated for the first time the *ex parte* hearing held on February 10 before Judge Clary after Crandall and his associates returned from Bryn Mawr.

As indicated above, the sole factual issue at the hearing on the criminal contempt charge which began on March 2, 1964, was whether petitioners had voted conditionally (84a-85a).

It was undisputed that, following service of the temporary restraining order, the proceedings became somewhat disorderly and confused (158a, 168a-169a, 208a, 216a, 229a, 243a, 275a-276a, 279a, 289a-290a). Petitioner Conole testified specifically that he questioned the validity of the service made while a meeting was in progress, and that, accordingly, he asked for votes on the resolutions but only on the condition that, if service was proper, the votes would be void (156a-157a, 168a). The six petitioners all testified that they had voted conditionally (156a-157a, 204a-207a, 230a, 237a-240a, 242a-243a, 253a, 255a-256a, 263a, 267a, 273a-

274a, 277a-278a, 349a). In so stating, they further testified that they had concentrated their attention on their Chairman Conole and had heard his statement of the condition (216a, 239a, 250a, 264a, 279a-280a). Crandall and the two directors allied with him took a contrary position (75a, 83a-84a), denying that petitioner Conole had stated any condition. However, Conole and petitioner Meyers testified that, at the time Conole stated the condition, Crandall and Speers were talking to each other (158a, 279a). As to whether petitioner Conole had questioned the validity of the service, Crandall denied having heard any such statement (290a) but Speers and Molloy, the two directors allied with him, admitted hearing Conole raise the question (81a, 298a).

This was the testimony introduced directly on the issue whether the voting on February 10 had been conditional or in outright defiance of the temporary restraining order. In addition, petitioners offered to show that the testimony of Crandall and his associates—if not based on a failure, because of the confusion, to hear Conole's statement as to the conditional vote—was part of a scheme or design which Crandall, aided by Speers and Molloy, had been carrying on since November, 1963, to secure control of BSC. Petitioners sought to show that Crandall and his associates had been carrying on a campaign, characterized by misstatements and half-truths, to achieve this end (85a-149a, 197a-202a, 280a-283a), and that the matters before Judge Clary—the complaint, the *ex parte* testimony on February 10 and the testimony at the hearing which began on March 2—were part of this pattern (84a-85a, 95a-97a, 101a-103a, 110a-112a). In a series of extremely broad rulings, Judge Clary refused to permit the defense to show anything that occurred prior to February 10, 1964 (131a-132a, 149a, 201a-202a, 280a-283a), stating that he did not "* * * give a hoot about * * *" any events which took place prior to that date (111a).

At the conclusion of the hearing, Judge Clary held (315a-316a):

> "* * * Notwithstanding the fact that there was then disclosed to them directly by the plaintiff in this case the existence of the court order and that such action was proscribed, the six defendants intentionally, willfully, and contumaciously proceeded with the meeting and passed unconditionally a resolution to amend the bylaws in a form proscribed by this Court. Notwithstanding the fact that there was read by Mr. Crandall to all six defendants the exact wording of the restraining order and what they were proscribed from doing by that order, the six defendants unconditionally passed resolutions which put into effect the very acts which had been proscribed by this Court. At some time during the meeting again the chairman said that the intrusion of the marshal and the servic of these papers were illegal, but at no time was any action taken on any conditional basis."

Judge Clary held that petitioners' guilt had been "* * * established by the evidence beyond any reasonable doubt." (316a).

Sentences were imposed on March 12, 1964. Judge Clary stated, with respect to the charge against Clement Conole: "It was the most arrogant defiance of an order of a court of the United States that has ever come to my attention."[1] Conole was fined $5,000 (419a).

The defendant Meyers was told "* * * the position that you held in the past aggravated the offense as far as you are concerned." Meyers was fined $3,000 (420a).

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1. Judge Clary made this statement after his attention had been called to the decision in **United States v. United Mine Workers**, 330 U. S. 258 (1947), in which John L. Lewis was fined $10,000 for calling a nationwide coal strike for thirty days, in time of national emergency and in announced defiance of an injunction of a United States Court.

The defendants Anable, Callahan, and R. C. Conole were each fined $1,000 (422a).

The defendant Lincoln was fined $2,000, because Judge Clary stated that he had watched Lincoln "very closely during the course of the hearing" and concluded he "hadn't lost the same arrogance [he] exhibited on February 10 * * *" (421a).

The defendants were also sentenced to stand committed until the fines were paid (2a-3a). They were fingerprinted, stripped of their ties and belts, and locked in cells until Clement Conole was able to raise and pay into court, pending the determination of these appeals, the sum of $15,000 to cover all of the fines imposed, plus costs.

The appeal from Judge Clary's order was first heard on February 16, 1965, by a panel composed of Circuit Judges Kalodner and Smith, and District Judge Kirkpatrick. On July 12, 1965, the court below, on its own motion, ordered the case to be set down for rehearing *en banc*, the date to be fixed by the Clerk. Reargument before the court *en banc* took place on June 10, 1966.

On August 26, 1966, the court below, in a brief *per curiam* opinion, affirmed Judge Clary's judgment insofar as it held petitioners' guilty of criminal contempt but reduced each fine by ninety percent (App., *infra*, pp. 1a-3a).

REASONS FOR GRANTING THE WRIT.

On many occasions, this Court has noted the extraordinary duty of care imposed upon federal district judges in their exercise of criminal contempt power, a duty which has deep roots in our history and institutions. There is recognized danger in a procedure which exposes a man to severe punishment without indictment or trial by jury, and that recognition has provided the touchstone for measuring whether or not the power has been exercised on a proper occasion and with proper restraint. Even where the contempt charged falls within "* * * the traditional category of contempt committed in open court * * *", **Ungar v. Sarafite**, 376 U. S. 575, 585 (1964), the summary contempt power exercised by a federal district court must be limited "* * * to the least possible power adequate to prevent actual obstruction of justice * * *". **In re McConnell**, 370 U. S. 230, 236 (1962). And that "* * * extraordinary power * * *" must be exercised so as to "satisfy the appearance of justice". **Offutt v. United States**, 348 U. S. 11, 14 (1954).

The reviewing court, in criminal contempt cases, has "* * * a special responsibility for determining that the power [of punishing for contempt] is not abused * * *". **Green v. United States**, 356 U. S. 165, 188 (1958). In **Offutt v. United States**, 348 U. S. at p. 13, Mr. Justice Frankfurter grounded the power to review criminal contempt cases on "* * * the importance of assuring alert self-restraint in the exercise by district judges of the summary power for punishing contempt * * *", as well as on the Supreme Court's supervisory authority over the administration of criminal justice.

In this case, the court below has completely failed to discharge this "special responsibility". In making this charge, petitioners are not unaware that they are asking this Court to review the unanimous opinion of the court

below sitting *en banc*. Rather, petitioners believe that the course of proceedings in the court below strengthens the propriety of their application.

The panel of judges below which first heard the appeal in this case had before it for consideration the now famous *dictum* in **United States v. Barnett**, 376 U. S. 681, 695, ftn. 12 (1964) with respect to the need for trial by jury in certain criminal contempt cases. The Court of Appeals for the Second Circuit in **United States v. Harris**, 334 F. 2d 460 (1964) had questioned the force of this *dictum* and certiorari had been granted. Thereafter, certiorari was granted in other cases which brought into question the **Barnett** dictum. All but **Cheff v. Schnackenberg**, 384 U. S. 373, decided June 6, 1966, went off on other grounds. In **Cheff**, this Court affirmed a sentence of six months but ruled that "* * * sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof". 384 U. S. at p. 380. The opinion dealt only with the imposition of punishment by way of imprisonment. At the time that Cheff's petition was granted, this Court denied the petition for certiorari of the Holland Furnace Company which had been heavily fined in the same Seventh Circuit proceeding which had imposed the six month sentence on Cheff. 381 U. S. 924.

The hearing *en banc* in this case took place on June 10, 1964, four days after this Court's decision in **Cheff**. The court below determined that under **Cheff**, the "* * * conditions which would require trial by jury are not present in the instant case * * *" (App., *infra*, p. 2a). It is not clear that the **Cheff** decision and the denial of certiorari to Holland put this question so completely at rest, and petitioners will discuss the question below.

The more important point here is that, having decided that **Cheff** removed the trial by jury issue, the court below summarily disposed of the case without any consideration of the principal points upon which petitioners had grounded their appeal. Petitioners had called the attention of the

panel which first heard the appeal to the **Barnett** dictum and had placed the **Cheff** decision before the court *en banc*. But petitioners' principal point at all times was that the prosecution had failed to prove beyond a reasonable doubt that there had been a contempt committed. The opinion below does not even advert to this issue, the issue on which petitioners were tried and convicted. Further, the court below did not squarely consider or decide petitioners' second major argument, whether there had been a denial of the due process hearing required by Rule 42(b) of the Federal Rules of Criminal Procedure.

Both of these contentions will be discussed below. The discussion will show that petitioners, respectable and experienced businessmen to whom the consequences of these convictions are severe and endless, have been treated with almost ruthless indifference by the opinion below. In the formal words of Rule 19(e), the court below has "* * * so far departed from the accepted and usual course of judicial proceedings * * *" as to warrant review by this Court.

1. The Prosecution Failed to Sustain Its Burden of Proving Beyond a Reasonable Doubt That a Contempt Had Been Committed.

It is well settled that "* * * in proceedings for criminal contempt the defendant is presumed to be innocent, [and] must be proved guilty beyond a reasonable doubt * * *". **Gompers v. Bucks Stove & Range Co.**, 221 U. S. 418, 444 (1911). The reviewing court has a duty to "* * * assess the evidence as a whole under the rigorous standards governing criminal trials * * *" to determine whether guilt has been established "* * * beyond a reasonable doubt * * *". **Green v. United States**, 356 U. S. at p. 179.

Judge Clary, in the district court, held that the petitioners' vote on resolutions at the February 10 board of directors' meeting was intentional and unconditional, and that the prosecution had so established "* * * beyond any reasonable doubt" (315a-316a). There had been no doubt

throughout the trial as to what the principal issue was, *i.e.*, whether the vote had been conditional or unconditional.[2] Indeed, the entire trial had been devoted to that question alone.

On appeal, the briefs of the parties on both sides treated this question as the central question in the case, namely, whether the evidence established beyond a reasonable doubt that petitioners had voted unconditionally and in willful defiance of the temporary restraining order. Similarly, the oral argument on behalf of both sides in the court below was principally devoted to this issue.

Notwithstanding these facts, the opinion below, to the extent it recognizes the principal issue in the case at all, merely states that Judge Clary's judgments "* * * were based upon factual determinations that the appellants, as officers and directors of Business Supplies Corporation, had willfully disobeyed a temporary restraining order issued pendente lite in a civil action" (App., *infra*, pp. 1a-2a). Taking this preliminary descriptive statement as though the point were conceded, the court below then went on to make short shrift of its version of the issues on appeal. The fact is that, applying the controlling standards of review, the conclusion should have been reached that Judge Clary's order could not be permitted to stand. Whether or not petitioners had been proven guilty of criminal contempt could not properly be brushed aside as a "factual determination" not worthy of further mention. The deci-

2. The prosecuting attorney conceded (N. T. 381) that he could find no authority that acting conditionally would constitute criminal contempt. This accords with common sense. Most of the activities which give rise to charges of criminal contempt—abusing a judge, picketing, and so forth—cannot be undertaken conditionally. But the type of activity here involved can be conditional, *i.e.*, one can vote conditionally on a resolution.

On the appeal, the Government urged for the first time that a conditional vote might constitute a contempt. The contention, advanced as an alternative to the Government's principal argument that the vote had been unconditional, was not supported by any authority.

sions in cases like **Gompers** and **Green** make this plain. In any event, the duty of review, imposed by decisions such as **McConnell**, **Offutt**, **Green** and many others, required that the court below give candid and careful attention to the principal issue in the case.

Had the full duty of review been discharged, we submit, as stated above, that a reversal of Judge Clary's order would have followed. Take, first, the direct testimony as to what happened at the February 10 meeting after the Assistant United States Marshal left the room. There were, of course, no disinterested witnesses to these occurrences. Crandall and his associates were locked in strife with Conole and the majority of the directors for control of the corporation. All witnesses agreed that the meeting had become confused and that everyone was talking at once. The directors who sided with Conole looked to him for guidance and heard him say that he questioned the validity of the service of the order but that a conditional vote would be taken on the proposed resolutions. Rather than interrupt the meeting and try to obtain local counsel, Conole decided to complete the meeting with the understanding that the resolutions were a nullity if, upon consulting counsel, he was told that the order was validly served. Crandall and his associates testified that they heard no such statement of condition. There was testimony that they were not listening to Conole but were talking to each other at the time that the condition was stated.

Given this testimony alone, it is difficult to see how it could be held that the prosecution proved beyond a reasonable doubt the commission of a criminal contempt—an unconditional vote in "* * * arrogant defiance * * *" of the court order.

That no such burden could be sustained is also indicated by the dictates of common sense. Whatever action petitioners took, they took with full knowledge of the temporary restraining order and in the presence of three hostile directors who participated in the meeting until the end.

This is conduct entirely consistent with the testimony that petitioners acted conditionally. To draw the opposite conclusion is to say that petitioners, experienced businessmen of high standing and excellent reputation, engaged in a senseless defiance of a court order, deliberately putting themselves in the power of their rival for corporate control.

Added to these considerations is the presumption of innocence mentioned in the **Gompers** case, a presumption which is given strong content by a consideration of the nature of the men here involved.

Clement Conole has had an outstandingly successful career in a wide variety of positions of responsibility. He has served as Deputy Industrial Commissioner of the State of New York, as a member of Governor Lehman's cabinet, as Chairman of New York's War Emergency Board, as member of the National War Labor Board, as Executive Vice President of the Philadelphia Chamber of Commerce, and in similar important and significant posts (85a-88a).

Petitioner Meyers was employed by the Government of the United States for twenty-six years. During the last few years of this period, he was Regional Commissioner of Internal Revenue for Pennsylvania, New Jersey, Delaware, Maryland and the District of Columbia (265a-266a). Petitioner Callahan was also with the Internal Revenue Service before joining BSC (229a).

Petitioner Anable worked for IBM for eighteen years before joining BSC and was the purchasing agent for IBM's research division (203a).

Petitioners Lincoln and R. C. Conole are both comparatively young men who have not held positions of responsibility outside BSC comparable to those of their fellow petitioners (241a-242a, 255a, 257a-258a). There is nothing in their background to justify the thought that they would willfully flout the law.

We submit that given all of these factors—the background and reputation of the men involved, the common sense of the situation, the testimony as to what actually

occurred—an appellate court, acting in accordance with the principles which guide review in criminal contempt cases, would reverse Judge Clary's order and dismiss the charge on the ground that the prosecution failed to sustain its burden of proof beyond a reasonable doubt. This is what the court below should have done. Its failure to do so was based on a complete avoidance of the principal issue litigated and argued.

2. Petitioners Were Not Accorded the Due Process Hearing Contemplated by Rule 42(b) of the Federal Rules of Criminal Procedure.

A second major argument was presented to the court below which required reversal of Judge Clary's order and the grant of a new trial. Petitioners contended that they had not been accorded the full due process hearing contemplated by Criminal Rule 42(b). Again, the court below gave no real consideration in its opinion to this major issue in the case.

No charge of contempt committed in open court, creating the necessity for summary action to prevent obstruction of justice, was involved here. Thus, the controlling principle, the principle embodied in Rule 42(b), was that clearly stated by Chief Justice Taft in **Cooke v. United States**, 267 U. S. 517, 537 (1925):

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. * * *"

Petitioners' major premise in presenting their evidence as to the occurrences at the meeting on February 10,

was that Crandall and his associates, in the confusion, did not hear petitioner Conole state that the voting was to be conditional. In the alternative, petitioners tendered evidence to show that Crandall, aided by Speers and Molloy, had been and, on February 10, was engaged in a scheme, involving the use of misleading statements, to gain control of BSC; and that the civil litigation instituted before Judge Clary on February 10, and the *ex parte* testimony given that day by Crandall after the meeting, were additional steps in this intracorporate strife (84a-85a, 95a-97a, 101a-103a, 110a-112a).

Thus, petitioners offered to show that, although BSC under Conole's management had grown to an annual volume of $22,000,000, Crandall met secretly in the fall of 1963 with an official of Chase Manhattan Bank, a principal creditor of BSC, and made inaccurate criticisms of management. As a result, the bank recommended, *inter alia*, that Crandall share the position of chief executive of the company (94a-95a, 97a-100a, 118a, 281a, 318a-323a). Conole, in an answering letter to the bank, corrected the information given by Crandall and upon which the bank had acted (98a-99a, 324a-330a).

Crandall exhibited the bank's letter to petitioners Meyers, Callahan and Lincoln, telling them that the bank wished him to assume control and offering them stock options if he secured this control (198a-201a). As Crandall spoke to each director, he told him that the other directors had promised to support him, which was not the fact (200a-201a).

Having thus attempted to subvert the disinterested directors, Crandall attempted, in a surprise move at a board of directors' meeting on December 21, 1963, to have himself made chief executive officer of the company and to increase the board of directors from 9 to 11, naming his personal attorney and a business associate to the vacancies (119a-121a, 124a-126a, 133a-134a, 136a, 334a-337a, 340a-345a). These proposals were defeated (128a, 132a-133a, 136a-137a).

These are illustrations of the proof which petitioners offered to show a plan or design on the part of Crandall and his associates to gain control of BSC. The proof offered by petitioners as to plan or design was of critical importance in evaluating the worth of the *ex parte* testimony given by Crandall and his associates at the February 10 hearing and their testimony at the March hearings. The proof offered would also have tended to show that the allegations of the civil complaint filed by Crandall on February 10, on the basis of which the temporary restraining order was issued, were either untrue or materially incomplete (84a-85a, 95a-97a, 101a-103a, 110a-112a) and that the ex parte testimony on February 10, which brought the contempt charge into being, followed the same inflammatory pattern.

As a technical matter, there is no doubt that the proof was admissible for the purpose of showing plan or design.[3] **Wigmore on Evidence** (3d Ed. 1940) ¶ 304; **United States v. Stirone**, 262 F. 2d 571, 576-577 (3rd Cir., 1959); **White v. Rosenthal**, 173 Pa. 175, 180-181 (1896); **Commonwealth v. Bruno**, 203 Pa. Superior Ct. 541, 552-553 (1964). But the proof was not rejected by Judge Clary on the basis of a technical evidentary ruling. Mention has already been made of the fact that Judge Clary, after hearing Crandall's *ex parte* testimony on February 10, stated (28a): "On this statement they have clearly violated the terms of the order" and immediately instituted criminal contempt proceedings (28a, 96a). Early in the hearings which began on March 2, Judge Clary stated that he did not "* * * give a hoot about * * *" any event which took place prior to February 10, the day of the meeting in Bryn Mawr (111a).

3. The prosecuting attorney cited no cases to support the exclusion of this evidence. Counsel for Crandall, who participated in the hearing, referred to a few authorities which, on analysis, are not in point, since in none of them was the evidence offered to show a continuing plan or scheme. **United States v. Klass**, 166 F. 2d 373 (3rd Cir., 1948); **Cwach v. United States**, 212 F. 2d 520 (8th Cir., 1954); **United States v. Rosenberg**, 146 F. Supp. 555 (E. D. Pa. 1956); **Commonwealth v. Petrillo**, 341 Pa. 209 (1941).

This personal position formed the basis for Judge Clary's exclusion of petitioners' evidence of plan or design. And the record contains many other indications that Judge Clary had subconsciously committed himself to the prosecution, that he had identified a supposed "* * * offense to self with obstruction of law. * * *". **Offutt v. United States,** 348 U. S. at p. 14; **Cooke v. United States,** 267 U. S. at p. 539. The following instances are illustrative: in cutting off the opening statement of defense counsel with the remark (65a), "I don't care to hear any more", as soon as counsel referred to the manner in which the prosecution had been instituted; in classifying as "minor" the sole question of fact which he was being asked to pass upon, namely, whether the defendants voted conditionally or unconditionally after the service of restraining order (96a); in repeatedly refusing (131a-132a, 149a, 201a-202a, 280a-283a) to accept or consider evidence on these matters, notwithstanding their obvious relevance in evaluating the conflicting testimony as to what occurred on February 10; in threatening to adjudge defendants' counsel in contempt if the latter should persist in attempting to preserve his clients' rights by asking "any more questions about anything that happened prior to February 10 (283a-284a);[4] in undertaking to explain, on a basis contrary to the record, that the prosecution witness Speers had failed to state certain material facts at the *ex parte* hearing on February 10, "Because I wouldn't let him" (302a); in remarking, con-

4. *Cf.* **In re McConnell,** 370 U. S. 230 (1962) in which the Supreme Court said (370 U. S. at p. 236):

> "While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom, or even from conduct so near to the court as actually to obstruct justice, it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases. An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice. * * * *"

This is all the more so where the alleged contempt was not in or near the courtroom. See, also, **Offutt v. United States,** *supra;* **Cooper v. Superior Court,** 359 P. 2d 274 (Sup. Ct. Cal. 1961).

cerning defense counsel's development of another material inconsistency in Speers' testimony, that counsel was simply "building up a record without any reason" (303a); in recalling the Marshal as the Court's own witness at the conclusion of the trial to testify again to the fact, not disputed in the pleadings or at trial and to which the Marshal had already testified, that the restraining order was properly served (312a); in his characterization of the alleged contempt as the "most arrogant * * *" he had ever heard (419a); in his remark concerning what he felt to be the "arrogance" of the defendant Lincoln during the trial (421a); in his refusal to accept evidence that Crandall's attorney had been notified by petitioners' counsel on February 12 that the resolutions were a nullity (161a); in imposing excessive sentences (419a-422a); and in having the defendants—respected and financially responsible citizens—committed to jail until they could procure the sums required to pay the unprecedented fines imposed (1a-2a).

It was argued to the court below that, putting aside the question of Judge Clary's personal involvement, the indicia of his possible involvement were such as to bring into play the principle that "* * * justice must satisfy the appearance of justice". **Offutt v. United States**, 348 U. S. at p. 14; **In Re Murchison**, 349 U. S. 133, 136-139 (1955). The opinion in **Murchison** also points out that the law has always "* * * endeavored to prevent even the probability of unfairness * * *" and that a judge who has become part of the accusatory process "* * * cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. * * *" 349 U. S. at pp. 136-139.

The court below avoided discussion of both of these issues, namely, the improper exclusion of evidence of plan or scheme, and the involvement of Judge Clary as prosecutor and judge.

As to the first point, the court below inaccurately stated that petitioners complained that evidence had not

been "* * * considered in mitigation of punishment" (App., *infra*, p. 2a). In fact, no issue of mitigation of punishment was tried. Petitioners' entire defense was based on the position that they were not guilty of contempt and their proof was offered on the single issue tried and decided, whether the vote on February 10 was conditional or in defiance of the court order.

On the question of a new trial before a different judge, the court below, after recognizing that a judge who initiates a proceeding should disqualify himself if he has become personally involved in the controversy, baldly stated (App., *infra*, p. 2a): "This, however, is not our situation." No discussion accompanied this statement. The court below went on to reduce the heavy fines, imposed by Judge Clary with such vehemence, by ninety per cent on the ground that the punishment was not reasonably related to the gravity of the offense charged. App., *infra*, p. 3a.

We submit that here, as in connection with the question whether the prosecution proved guilt beyond a reasonable doubt, the court below failed in its duty of review in this criminal contempt case. The questions were important—the improper limitation of the scope of the hearing, the involvement of the district judge in the prosecution—and neither question was openly considered and decided.

3. The Trial by Jury Issue.

In **Cheff**, 384 U. S. 373, the opinion of Mr. Justice Clark, who announced the judgment of the Court, adopted the position foreshadowed by the *dictum* in **Barnett**, namely, that "* * * punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." Reference was made to 18 U. S. C. 1 which defines "petty offense" as "* * * any misdemeanor, the penalty for which does not exceed imprisonment for a period of more than six months or a fine of not more than $500, or both * * *". Since Cheff had been sentenced to six months imprisonment, his conviction without trial by jury was affirmed.

Taking the same approach, a trial by jury should have been accorded in this case. Fines greatly in excess of $500 were imposed.[5] Measured by these fines, petitioners were tried and convicted, without a jury, for something greater than a petty offense.

Petitioners recognize that this Court denied the petition for certiorari filed by the Holland Furnace Company to review a heavy fine imposed in the same proceeding which sentenced Cheff to imprisonment. There is, we submit, a vast difference between a fine imposed on a corporation and punishment imposed on an individual by fine.

This case illustrates the point perfectly. Petitioners, respectable businessmen all, have felt and will feel the lash of their convictions so long as those convictions stand. Whatever the amount of the fine, the fact of the conviction, and Judge Clary's characterization of petitioners, has come up and will come up in connection with financing, applications for business licenses and permits, arrangements for insurance and bonds, business ratings and in innumerable other ways. In the eyes of the business world, petitioners stand convicted of a crime of "the most arrogant defiance of an order" of a United States District Court. The *quantum* of their punishment at the close of trial in no way measures their total punishment. These considerations again raise the question whether it is rational to measure the constitutional need for trial by jury by reference to the provisions of 18 U. S. C. § 1.

On the facts of this case, it can be held that petitioners were entitled to trial by jury since the fines imposed at the close of the trial on each of them exceeded $500. But it can further be urged that the rational distinction between summary trial and trial by jury in contempt cases

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5. It is difficult to understand how a constitutional requirement of jury trial could be removed by the subsequent action of a reviewing court in reducing the sentence imposed after trial. Here, the fines imposed by Judge Clary were reduced by the court below so that the highest fine, that imposed on petitioner Conole, is now $500.

lies in the nature of the contempt. Where the contempt occurs in open court, immediate punishment may be warranted to prevent "* * * demoralization of the court's authority before the public." **In Re Oliver**, 333 U. S. 257, 276 (1948); **Ungar v. Sarafite**, *supra*. But where, as here, the alleged contempt took place at a remote distance from the court, where there was no trial pending, where no consequences whatsoever flowed from the alleged contempt, where, upon conviction, a man stands convicted of a crime in the eyes of the world—then, the due process required by this Court (**Cooke v. United States**, 267 U. S. 517, 536 (1925)) should include a right to trial by jury. Mr. Justice Douglas has summed up the considerations in his recent dissent in the **Cheff** case, 384 U. S. 384.

In any event, petitioners here, by reference to 18 U. S. C. § 1, were tried and convicted for something more than a "petty offense" and thus were entitled to a trial by jury.

CONCLUSION.

For the reasons set forth above, this petition for the issuance of writ of certiorari should be granted.

Respectfully submitted,

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SAMUEL D. SLADE,
TOM P. MONTEVERDE,
Attorneys for Petitioners.

SCHNADER, HARRISON,
SEGAL & LEWIS,
Of Counsel.

November 23, 1966

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14861 TO 14866 INCLUSIVE

UNITED STATES OF AMERICA,
Appellee,

v.

CLEMENT V. CONOLE, CHARLES E. ANABLE, RICHARD C. CONOLE, BRIDWELL W. LINCOLN, WILLIAM J. CALLAHAN AND ALVA M. MEYERS,
Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 16, 1965

Reargued June 10, 1966

Before STALEY, *Chief Judge,* MCLAUGHLIN, KALODNER, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges.*

Opinion of the Court

(Filed August 26, 1966)

PER CURIAM.

These appeals are from judgments of conviction entered in contempt proceedings initiated by the trial judge. The only penalties imposed were fines which ranged from $1000 to $5000. The judgments were based upon factual determinations that the appellants, as officers and directors

of Business Supplies Corporation, had willfully disobeyed a temporary restraining order issued pendente lite in a civil action. Reversal of the judgment is urged on several grounds.

Although they made no demand for a jury trial the appellants argue that under the facts and circumstances of this case the lower court lacked the authority to summarily try and punish them. This argument is without merit. The conditions which would require trial by jury are not present in the instant case. *Cheff v. Schnackenberg*, —U.S.—, (June 6, 1966) see also *United States v. Barnett*, 376 U.S. 681, 692 (1964); *Green v. United States*, 356 U.S. 165, 187 (1958).

The appellants contend that since the trial judge initiated the proceedings he was disqualified to summarily hear the matter on the merits. This argument is not supported by any of the cases cited in their brief. Such disqualification is not required unless "the contempt charged involves disrespect to or criticism of [the] judge." FED. RULES CR. PROC., rule 42(b), 18 U.S.C.A.; *Nilva v. United States*, 352 U.S. 385, 395-96 (1957). There are cases in which it has been held that the judge who initiates the proceedings should disqualify himself where he has become personally embroiled in the controversy out of which the alleged contempt arose. *Offutt v. United States*, 348 U.S. 11 (1954); *Cooke v. United States*, 267 U.S. 517 (1925); *cf. In Re Murchison*, 349 U.S. 133 (1955). This, however, is not our situation.

The appellants maintain that they were denied the full and fair hearing contemplated by rule 42(b), *supra*. They complain that the trial judge so restricted the proofs as to preclude the introduction of evidence which should have been received and considered in mitigation of punishment. There is some merit to this complaint but it does not warrant complete reversal of the judgments. The evidence in the record is sufficient to enable us to decide whether the trial judge exceeded the reasonable bounds of

his discretion in the imposition of the fines. We think he did.

The statute under which the appellants were prosecuted, 18 U.S.C.A. § 401, does not limit the sentencing power of the courts but there is implicit in this absence of limitation a requirement that the discretionary authority be exercised with restraint. *Green v. United States, supra,* at 188. Where, as here, the purpose of the contempt proceeding is to vindicate the authority and dignity of the court, the punishment imposed should bear some reasonable relation to the nature and gravity of the contumacious conduct. Measured by these principles the fine imposed on each of the appellants was excessive.

The fines will be vacated and the matter will be remanded to the District Court with directions that each fine be reduced by ninety percent.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14861

UNITED STATES OF AMERICA

v.

CLEMENT V. CONOLE, CHARLES E. ANABLE, RICHARD C. CONOLE, BRIDWELL W. LINCOLN, WILLIAM J. CALLAHAN AND ALVA M. MYERS

CLEMENT V. CONOLE,
Appellant

(D. C. MISC. No. 2666)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: STALEY, *Chief Judge* and MCLAUGHLIN, KALODNER, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court of March 12, 1964 be, and the same is hereby affirmed insofar as it adjudicates the defendant guilty of criminal contempt and reversed insofar as it imposes a fine of $5000, and the cause is remanded to the District Court with directions to reduce the fine by ninety percent, from $5000 to $500, in accordance with the opinion of this Court.

ATTEST:

IDA O. CRESKOFF
Clerk

August 26, 1966

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14862

UNITED STATES OF AMERICA

v.

CLEMENT V. CONOLE, CHARLES E. ANABLE, RICHARD C. CONOLE, BRIDWELL W. LINCOLN, WILLIAM J. CALLAHAN AND ALVA M. MYERS

CHARLES E. ANABLE,
Appellant

(D. C. Misc. No. 2666)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: STALEY, *Chief Judge*, and MCLAUGHLIN, KALODNER, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges*.

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court of March 12, 1964 be, and the same is hereby affirmed insofar as it adjudicates the defendant guilty of

criminal contempt and reversed insofar as it imposes a fine of $1000, and the cause is remanded to the District Court with directions to reduce the fine by ninety percent, from $1000 to $100, in accordance with the opinion of this Court.

ATTEST:

IDA O. CRESKOFF
Clerk

August 26, 1966

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14863

UNITED STATES OF AMERICA

v.

CLEMENT V. CONOLE, CHARLES E. ANABLE, RICHARD C. CONOLE, BRIDWELL W. LINCOLN, WILLIAM J. CALLAHAN AND ALVA M. MYERS

RICHARD C. CONOLE,
Appellant

(D. C. Misc. No. 2666)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: STALEY, *Chief Judge,* and MCLAUGHLIN, KALODNER, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court of March 12, 1964 be, and the same is hereby affirmed insofar as it adjudicates the defendant guilty of criminal contempt and reversed insofar as it imposes a fine

of $1000, and the cause is remanded to the District Court with directions to reduce the fine by ninety percent, from $1000 to $100, in accordance with the opinion of this Court.

ATTEST:

IDA O. CRESKOFF
Clerk

August 26, 1966

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14864

UNITED STATES OF AMERICA

v.

CLEMENT V. CONOLE, CHARLES E. ANABLE, RICHARD C. CONOLE, BRIDWELL W. LINCOLN, WILLIAM J. CALLAHAN AND ALVA M. MYERS

BRIDWELL W. LINCOLN,
Appellant

(D. C. MISC. No. 2666)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: STALEY, *Chief Judge*, and MCLAUGHLIN, KALODNER, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges*.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court of March 12, 1964 be, and the same is hereby affirmed insofar as it adjudicates the defendant guilty of criminal contempt and reversed insofar as it imposes a fine

of $2000, and the cause is remanded to the District Court with directions to reduce the fine by ninety percent, from $2000 to $200, in accordance with the opinion of this Court.

ATTEST:

IDA O. CRESKOFF
Clerk

August 26, 1966

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14865

UNITED STATES OF AMERICA

v.

CLEMENT V. CONOLE, CHARLES E. ANABLE, RICHARD C. CONOLE, BRIDWELL W. LINCOLN, WILLIAM J. CALLAHAN AND ALVA M. MYERS

WILLIAM J. CALLAHAN

Appellant

(D. C. MISC. No. 2666)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: STALEY, *Chief Judge,* and MCLAUGHLIN, KALODNER, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court of March 12, 1964 be, and the same is hereby affirmed insofar as it adjudicates the defendant guilty of criminal contempt and reversed insofar as it imposes a fine

of $1000, and the cause is remanded to the District Court with directions to reduce the fine by ninety percent, from $1000 to $100, in accordance with the opinion of this Court.

ATTEST:

IDA O. CRESKOFF
Clerk

August 26, 1966

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14866

UNITED STATES OF AMERICA

v.

CLEMENT V. CONOLE, CHARLES E. ANABLE, RICHARD C. CONOLE, BRIDWELL W. LINCOLN, WILLIAM J. CALLAHAN AND ALVA M. MYERS

ALVA M. MEYERS,

Appellant

(D. C. MISC. No. 2666)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: STALEY, *Chief Judge*, and MCLAUGHLIN, KALODNER, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges*.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court of March 12, 1964 be, and the same is hereby affirmed insofar as it adjudicates the defendant guilty of criminal contempt and reversed insofar as it imposes a fine

of $3000, and the cause is remanded to the District Court with directions to reduce the fine by ninety percent, from $3000 to $300, in accordance with the opinion of this Court.

ATTEST:

IDA O. CRESKOFF
Clerk

August 26, 1966